IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 264

GRACE W. YORK,

Respondent,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

GUARANTY TRUST COMPANY OF NEW YORK

By JOHN W. DAVIS
RALPH M. CARSON
Attorneys for Petitioner
15 Broad Street
New York, N. Y.

July 12, 1944.

INDEX

CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

GRACE W. YORK,
Respondent,
against
No.
GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the United States:

Guaranty Trust Company of New York, a New York corporation, defendant in the above-entitled action, respectfully prays the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order and decision of the Circuit Court of Appeals for the Second Circuit rendered herein May 25 1944, one judge dissenting, (R. pp. 64-66, 123) which reversed a judgment entered by the United States District Court for the Southern District of New York on October 22 1943 dismissing the complaint (R. 27) upon the ground of the previous decision of the Second Circuit Court of Appeals (*Hackner* v. *Morgan* 130 F. 2d 300) with respect to which this Court denied certiorari (317 U. S. 691). The record upon which was rendered the decision herein

sought to be reviewed is acknowledged (R. 82) to have been substantially the same as the record upon which the same Circuit Court of Appeals had previously reached the opposite result.

Summary Statement of Matter Involved

The suit was brought on January 22 1942 by a citizen of Pennsylvania against a citizen of New York as a spurious class action (Rule 23 [a][3] of the Federal Rules of Civil Procedure) to enforce a claim for breach of trust claimed to have arisen in 1931 against the petitioner as indenture trustee of an issue of notes. It involves the rule in *Erie R. Co.* v. *Tompkins* 304 U. S. 64, the application thereof made by *Russell* v. *Todd* 309 U. S. 280; and the application of Rule 56 of the Federal Rules providing for summary judgment—as to all of which petitioner contends that the Second Circuit Court of Appeals has erred.

Plaintiff as owner of $6,000 of notes issued in May 1930 by Van Sweringen Corporation, sues on behalf of a class of noteholders aggregating $1,213,000 of the $30,000,000 issue, on the theory that petitioner as trustee of the note issue had committed a breach of trust in consenting to and assisting an exchange offer made to noteholders by Van Sweringen Corporation on October 29 1931 which was accepted by all the noteholders except plaintiff and her class, i.e. by some 96% of the noteholders. Respondent did not own her notes at the time of the exchange offer, having concededly acquired them as a gift in April 1934 (R. 16).

Defendant moved for summary judgment before answer pursuant to Rule 56 (b) upon the basis primarily of the decision of the District Court and Circuit Court of

Appeals in *Hackner* v. *Morgan* (*Eastman* v. *Guaranty Trust Company*) in 43 F. Supp. 537 and 130 F. (2d) 300, with respect to which this Court denied certiorari in 317 U. S. 691 and denied a rehearing of the petition for certiorari in 317 U. S. 713.

The theory of both the *Hackner* and the *York* suits was that petitioner had violated its duties as trustee in permitting the making of the exchange offer, in that petitioner had to its own potential advantage permitted utilization for the purpose of the exchange offer, of certain securities which the obligor Van Sweringen Corporation had undertaken to keep segregated and free and clear for the benefit of all noteholders. The exchange offer gave noteholders, for each $1,000 note, $500 in cash and 20 shares of stock of Van Sweringen Corporation. Hackner (Eastman) brought a representative action on behalf of noteholders who had accepted the offer, and on Guaranty Trust Company's motion for summary judgment this action was dismissed on the merits by the District Court and the Circuit Court of Appeals in decisions which this Court declined to review. Thereafter York brought a similar action on behalf of noteholders who had declined the offer, under the same indenture and upon substantially the same record in every respect. The District Court, following the previous course of decision, again granted summary judgment (R. 27, 23). But this time, upon appeal, the Second Circuit Court of Appeals by Frank J. (who had concurred in part in the *Hackner* case) reached an opposite result, holding that the indenture imposed upon petitioner the duties of an express trustee whereas the former Court had held the contrary; holding that petitioner had violated those duties whereas the former Court had left undisturbed the District Court's

determination to the contrary; holding that petitioner's breach of duty had caused damage to the plaintiff whereas the former Court had held the contrary; and finally, declining to apply the New York six-year and ten-year statute of limitations on the theory that even in a diversity case a Federal court of equity may at its pleasure vary the rule of limitations of the forum in accordance with what the court considers to be "equitable."

Respondent's contention in this case and plaintiff Hackner's contentions in the prior case were that petitioner had violated a fiduciary relationship in that the position of petitioner as a bank creditor of an affiliate of Van Sweringen Corporation was or might have been benefited by consummation of the exchange offer. However, respondent did not seek to defeat summary judgment by claiming the existence of an issue of fact. Respondent on the contrary stipulated that the facts set forth in petitioner's moving papers were true (R. 16-17) and further conceded the absence of any issue by making her own cross-motion upon the same papers (R. 22).

Rehearing in Circuit Court of Appeals

The opinion of the Court of Appeals reversing the judgment of dismissal below (R. 27) was rendered by that Court March 2 1944. The decision remanded the action for trial. Petitioner then filed in the Court of Appeals a petition for rehearing (R. 35-60), which led to reconsideration of the opinion (R. 61-3). In consequence, while as a formal matter the Court denied rehearing, it did recall its opinion of March 2 1944 and substitute a revised opinion dated May 25 1944 (R. 64-5, 66-122).

The substituted opinion of May 25 1944 reached the same result as did the opinion of March 2 1944, but represented a modification thereof in some respects. Moreover, while the Court in the prior opinion had been unanimous, one judge (A. N. Hand J.) dissented from the final opinion (R. 119-122). The dissenting judge candidly stated (R. 119-121):

> "Upon reconsideration of this case on the petition for rehearing, I have become convinced that we seriously erred in our original decision. I can see no reason to suppose that the Guaranty Trust Company was guilty of a breach of any fiduciary relation which it assumed under the trust indenture. . . . But aside from any question as to the merits of plaintiff's claim, I see no sufficient reason for not holding it barred by the New York statute of limitations. . . ."

After the filing of the substituted opinion of May 25 1944, the majority inserted various minor amendments which will appear on the certified copy filed with this Court.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 USCA §347.

The decision and order of the Circuit Court of Appeals herein were filed on May 25 1944 (R. 64, 66). The order for mandate was entered June 29 1944 (R. 123). On June 13 1944 the Circuit Court of Appeals stayed the mandate for thirty days, pending petitioner's application for a writ of certiorari.

Questions Presented

1. In an equity case in a Federal court based on diversity of citizenship, is the court bound by the State statute of limitations held to govern like cases by the State courts?

2. Can a Federal court of equity, in a diversity case, consistently with the rule of *Erie R. Co. v. Tompkins* 304 U. S. 64, extend the period of limitations by equitable considerations of laches where the doctrine of laches is not recognized for such purposes by the State courts in similar cases?

3. Assuming that a Federal court exercising exclusively equitable jurisdiction in a diversity case may employ the doctrine of laches to extend the period of limitations established by the law of the State in equity cases, is not the present action, being a claim for money damages against an indenture trustee, one of concurrent jurisdiction in which equity must apply without exception the statute of limitations as at law?

4. Did the Court of Appeals correctly apply the substantive law of the forum, as required by *Ruhlin* v. *New York Life Insurance Co.* 304 U. S. 202 and subsequent cases, in treating petitioner as the trustee of an express trust notwithstanding the absence of a *res*?

5. Did the Court of Appeals correctly apply the substantive law of the forum, as required by the *Erie* and *Ruhlin* cases, in refusing to hold that the exculpatory clause of the indenture constituted a defense on the stipulated facts?

6. Did the Court of Appeals correctly apply the substantive law of the forum, as required by the *Erie* and *Ruhlin* cases, in permitting plaintiff to maintain this action in respect of notes which she did not own at the time of the transactions complained of; and in further holding that the burden of proof was upon petitioner with respect to the possible existence of an express assignment of the cause of action?

7. Did the Court of Appeals correctly apply Rule 56 of the Federal Rules of Civil Procedure (dealing with summary judgment) adopted by this Court, 308 U. S. 647, pursuant to the Act of June 19 1934, 48 Stat. 1064, in declining to give effect to the record before it with respect to questions 5 and 6 above stated and in remanding the case?

8. Under the correct rule of damages, did plaintiff's claim in respect of her $6,000 of notes exceed $3,000 exclusive of interest and costs?

Reasons for Allowing the Writ

1. In holding that the New York six-year and ten-year statutes of limitation need not be applied by it (R. 102-115), the Court of Appeals

(a) departed from the law of the forum as fixed by New York Civil Practice Act §48 and §53 and decisions in *Potter* v. *Walker* 276 N. Y. 15, *Keys* v. *Leopold* 241 N. Y. 189, *Kalmanash* v. *Smith* 291 N. Y. 142, *Cwerdinski* v. *Bent* 281 N. Y. 782, *Dunlop's Sons, Inc.* v. *Spurr* 285 N. Y. 333; *Singer* v. *Carlisle* 26 N. Y. S. (2d) 172, 261 A. D. 897, leave to appeal denied 285 N. Y. 863, and *Goldstein* v. *Tri-Continental Corporation* 282 N. Y. 21;

(b) deviated from its own decision in *Shultz* v. *Manufacturers & Traders Trust Co.* 128 F. (2d) 889, as to which this Court denied certiorari in 317 U. S. 674;

(c) disregarded the doctrine plainly established by this Court in *Russell* v. *Todd* 309 U. S. 280, 293 that Federal courts of equity even in a non-diversity case will adopt and apply local statutes of limitation which are applied to like causes of action by the State courts, and also disregarded the principle of the *Erie* and *Ruhlin* cases upon which *Russell* v. *Todd* rests;

(d) conflicted with the decision of the Fifth Circuit Court of Appeals in *Roos* v. *Texas Co.* 126 F. (2d) 767 and with the opinion of the Third Circuit Court of Appeals in *Black & Yates* v. *Mahogany Association* 129 F. (2d) 227 as to which this Court denied certiorari in 317 U. S. 672.

2. The decision below is also in conflict with *Erie R. Co.* v. *Tompkins* and *Ruhlin* v. *New York Life Insurance Company* in employing as a reason for the extension of the New York statutory term of limitations equitable considerations of laches which are no part of the substantive law of New York (New York Civil Practice Act §10; *Gilmore* v. *Ham* 142 N. Y. 1, 6; *Pollitz* v. *Wabash R. Co.* 207 N. Y. 113, 130).

3. In declining to regard the jurisdiction of equity in this case as concurrent with that at law and in holding that it is of no moment whether the jurisdiction here is or is not exclusively equitable, the Court below departed from the established course of decision in both the State and

the Federal courts as instanced by *Keys* v. *Leopold* 241 N. Y. 189 and by *Clarke* v. *Boorman's Executors* 18 Wall. 493, 505 and other authorities cited in *Russell* v. *Todd* 309 U. S. 280, 289; and also departed from the rule of the *Erie* and *Ruhlin* cases.

4. The decision below is believed to be at variance with the substantive law of New York on three questions presented by this record; namely,

(a) the requisites of an express trust in New York as shown by *Brown* v. *Spohr* 180 N. Y. 201, and by *Bradford* v. *Chase National Bank* 24 F. Supp. 28, 105 F. (2d) 1001, 309 U. S. 632, and *Hackner* v. *Morgan* (*Eastman* v. *Guaranty Trust Company*) 43 F. Supp. 637, 130 F. (2d) 300, cert. denied 317 U. S. 691;

(b) the inability of subsequent holders of bonds or notes to sue in respect of prior transactions, as instanced by *Elkind* v. *Chase National Bank* 259 A. D. 661, 284 N. Y. 726, and *Smith* v. *Continental Bank & Trust Company* 292 N. Y. 275. The Court of Appeals recognized the effect of the decisions in New York on this subject (R. 102) but refused to apply them on the basis of assumptions contrary to the New York law;

(c) the effect under New York law of the exculpatory clause in the indenture under which plaintiff claimed, as instanced by *Hazzard* v. *Chase National Bank* 159 Misc. 57, 257 A. D. 950, 282 N. Y. 652.

5. With respect to the possible existence of an assignment of the cause of action within the New York rule, the Court of Appeals refused to follow the law of the forum concerning the burden of proof as established by *Smith* v. *Continental Bank & Trust Company* 292 N. Y. 275, although required to do so by the decision of this Court in *Cities Service Oil Co.* v. *Dunlap* 308 U. S. 208.

6. The decision below seriously impairs the usefulness of summary judgment under Rule 56 of the Federal Rules of Civil Procedure in refusing to accept for the purpose of sustaining a judgment of dismissal below a record accepted as complete by the parties through both stipulation (R. 16-17) and cross-motion (R. 22) and in remanding the case for trial, notwithstanding the record made by the parties.

7. Stability and due order in the administration of justice suggest the desirability of a review by this Court, in view of the fact that on substantially the same record the same Court of Appeals in *Hackner* v. *Morgan* (*Eastman* v. *Guaranty Trust Company*) 130 F. (2d) 300 reached the opposite result which this Court refused to review, 317 U. S. 691 and 713. Taking both cases together, we call attention to the fact that four judges in the lower courts have found petitioner to be right on the merits, and only one judge has thought a remand and trial to be necessary; *i.e.*, Bright D.J. and Chase and Clark JJ. in the *Hackner* case, and A. N. Hand J. in the *York* case have found for the petitioner, whereas Learned Hand J., in the *York* case, alone has found for the respondent if we eliminate Frank J. on the ground that he has voted both ways

(with respect to one issue involved), and Rifkind D.J. in the *York* case on the ground that his decision for the petitioner was controlled by the previous decision of the Court of Appeals in the *Hackner* case. It would be in the interest of the administration of justice that this conflict and diversity in the same Court of Appeals on the same record should be resolved in this Court.

Prayer

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the order and decision of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may be proper.

GUARANTY TRUST COMPANY OF NEW YORK

By JOHN W. DAVIS
RALPH M. CARSON
Attorneys for Petitioner
15 Broad Street
New York, N. Y.

July 12, 1944.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of Rifkind D.J. granting summary judgment to petitioner (R. 23-5) is not reported. The opinion of the Second Circuit Court of Appeals as revised after reconsideration on May 25 1944 (R. 66-122) has not yet been reported. The opinion of the District Court granting summary judgment on substantially the same record in *Hackner* v. *Morgan* (*Eastman* v. *Guaranty Trust Company*) appears in 43 F. Supp. 637, and unanimous affirmance thereof by the Second Circuit Court of Appeals is reported in 130 F. (2d) 300. Certiorari was denied by this Court, 317 U. S. 691 and 713.

Jurisdiction of this Court

The order and decision of the Circuit Court of Appeals for the Second Circuit were filed May 25 1944 (R. 64, 66) and the order for mandate entered June 29 1944 (R. 123). Jurisdiction of this Court is invoked under Judicial Code §240 (a), 28 USCA §347 (a) as amended by the Act of February 13 1925.

Statement of the Case

Plaintiff commenced the action January 22 1942 in the United States District Court for the Southern District of New York (R. 1) as holder of $6,000 principal amount out of $1,213,000 still outstanding of a $30,000,000 note issue which matured May 1 1935 (R. 2, 3). Petitioner was named trustee under a trust indenture executed by the

obligor, Van Sweringen Corporation, on May 1 1930 (R. 3). The indenture (reprinted at pp. 75-105 of the Hackner record filed in this Court, which record the parties stipulated should be deemed part of the record in the *York* case, R. 16), imposed certain duties and conferred certain powers on petitioner as trustee, but expressly limited its obligations and provided that it should not be liable for anything in connection with the trust except for its own "wilful misconduct" (Hackner record, p. 98). The petitioner as trustee was not given custody or possession of any *res*. For the better assurance of the noteholders, the obligor covenanted to keep certain assets segregated and free from encumbrance, and the two brothers Van Sweringen, by a separate instrument, undertook to maintain such assets at a market value equal to one-half the principal amount of the notes so long as $15,000,000 thereof should be outstanding (Hackner record, pp. 105-111); but it was specifically provided that the segregated assets should not constitute collateral security for payment of the notes (Hackner record, p. 84).

In October 1930 petitioner with other banks constituting a group, made large advances to two corporations affiliated with the obligor Van Sweringen Corporation, and controlled by the two Van Sweringens personally. The collateral for these advances included the common stock of Van Sweringen Corporation. Petitioner's participation in these loans was motivated largely by its desire to protect the noteholders against a threatened default at that time (Hackner record, p. 21).

The grievance of plaintiff York is that in October 1931 petitioner consented to and assisted in a plan for public purchase of the notes for 50 cents on the dollar in cash and

delivery of 20 shares of the obligor's common stock against each note. The reasons why petitioner approved this procedure are fully set forth in three uncontradicted affidavits filed in the *Hackner* case (Hackner record, pp. 15-49) and made a part of the York record (R. 16), but the details are not material to the present application for certiorari. In substance, the proof showed, without exception or dispute, that the segregated assets were being threatened with dissipation by private purchases on a depressed market and that the petitioner as trustee was anxiously insistent that the assets of the obligor available for retirement of the notes be made publicly and equally available on the same terms to all noteholders. As the stock to be used in the purchase offer was part of the collateral securing the bank loan, consent of the banks including the petitioner had to be obtained to permit its withdrawal from the collateral The purchase offer was made on October 29 1931 and remained open until December 15 1931 (Hackner record, pp. 70, 45).

Petitioner made no profit of any kind out of or in connection with the exchange offer, the primary contention of the plaintiff apparently being that in any event petitioner as a creditor in the bank loan stood to benefit by a substitution of collateral if a large proportion of noteholders did not accept the offer. The District Court in the *Hackner* case 43 F. Supp. 637, 642, found that Guaranty Trust Company received no part of the segregated assets for its personal benefit. This finding was affirmed by the Second Circuit Court of Appeals, 130 F. (2d) 300. In the instant case the Court of Appeals found on the same evidence that the creditor banks as a group received $106,000 under the plan (R. 85), but the Court also

acknowledged that as a part of the plan the banks gave up a right to $300,000 (R. 86). Although the fact is immaterial for the purposes of certiorari, we note that upon the uncontradicted evidence (Hackner record, pp. 32-3) the purported finding of the Court below as to the $106,000 was wrong.

Plaintiff, not a noteholder at the time of the exchange offer; received her notes as a gift more than two years later on April 19 1934 (R. 16).

The exchange offer approved by petitioner was accepted by the holders of all the $30,000,000 notes except those holding an aggregate of $1,213,000 principal amount (including plaintiff's assignor). In the representative suit known as the *Hackner* case Eastman, who accepted the exchange offer, was held not entitled to recover on the ground that no trust existed, that the petitioner as fiduciary fully performed its duty, and that in any event Eastman suffered no damage. 43 F. Supp. 637, 130 F. (2d) 300, certiorari denied 317 U. S. 691 and 713. The author of the opinion in the instant case concurred in the *Hackner* case in the last ground only, viz. that accepting noteholders sustained no damage.

Statutes Involved

New York Civil Practice Act §10 provides:

> "§10. Application of article.
>
> "The provisions of this article apply and constitute the only rules of limitation applicable to a civil action or special proceeding, except in one of the following cases:

1. A case where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties.

2. A case where the time to commence an action has expired when this article takes effect. . . . "

Civil Practice Act §48 provides, so far as material:

"§48. Actions to be commenced within six years.

"The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument.

. . . . . .

3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article. (Am'd L. 1936, ch. 558, in effect Sept. 1, omitting 'an injury to property or' from subd. 3; cf. §49.)"

Civil Practice Act §53 provides:

"§53. Limitation where none specially prescribed.

"An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Specification of Errors to be Urged

The Circuit Court of Appeals erred

1. In denying to petitioner the protection of the New York statute of limitations and in extending

the New York statute by "equitable" considerations (laches) unknown to the substantive law of New York in like case.

2. In failing to hold that the jurisdiction in equity exercised in this case was merely concurrent with jurisdiction at law so as to require the application of limitations.

3. In failing to observe and apply the substantive law of New York as to the existence of a trust, the effect of the exculpatory clause here involved, and the inability to sue of an assignee subsequent to the event.

4. In failing to give due effect to Rule 56 of the Federal Rules of Civil Procedure, 308 U. S. 647 at 734.

POINT I

The New York statute of limitations barred this action more than four years before its inception.

The purchase offer which plaintiff treats as a breach of trust was (as we have above stated) effective from October 29 to December 15 1931. This action was brought more than ten years later on January 22 1942 (R. 1).

A. Under the law of New York this action was barred on or before December 15 1937.

The six-year statute of limitations (as it stood before the amendment effective September 1 1936 which reduced to three years the liability for injury to property) had

completely barred this action at the time it was brought in the District Court in 1942. Under the law of New York there can be no controversy about this fact, as shown by Civil Practice Act §48 and the cases cited in the petition at p. 7 above. While respondent urged on rehearing in the Circuit Court of Appeals that the defense of limitations had not been "pleaded", the fact is that petitioner's motion for summary judgment was made before answer, as expressly permitted by Rule 56 (b), and that a motion before answer necessarily imports the right to obtain judgment upon any ground upon which it can be granted. *A. G. Reeves Steel Construction Co.* v. *Weiss* 119 F. (2d) 472, 476, certiorari denied 314 U. S. 677.

B. Disregard by the Court below of the statute of limitations of New York violates the principle clearly laid down for all United States courts in diversity cases by *Erie R. Co.* v. *Tompkins* and *Russell* v. *Todd*

Accepting for the purpose of discussion our contention with regard to the application of the New York statute of limitations (R. 103); the Court of Appeals held that it was not bound to follow the New York law against what it might deem to be countervailing "equitable considerations" (R. 103-115). The doctrine of unlimited Fetleral "remedial rights" which the majority below invoked to support this conclusion is of wholly novel impression since 1938 (the year of the decision in *Erie R. Co.* v. *Tompkins*), and is of itself sufficient, we submit, to require a review at the hands of this Court. It or something like it was argued in the briefs of counsel in *Russell* v. *Todd*, 309 U. S. 280, but was not made the subject of decision by this Court in that case. Upon analysis it will be found that the

attempt of the majority below to exclude the statute of limitations of the forum from the scope of *Erie R. Co.* v. *Tompkins* rests upon sweeping and obsolete dicta in a series of cases antedating 1938 and based upon the metaphysics of *Swift* v. *Tyson* 16 Pet. 1, which *Erie R. Co.* v. *Tompkins* overruled. As regards the few precedents cited in the majority opinion below of date in or after 1938, the fact would seem to be that the opinion of this Court in each instance was directed either to the Federal law applicable in a non-diversity case (such as *D'Oench, Duhme & Co.* v. *F. D. I. C.* 315 U. S. 447, discussed in footnote 42 of the majority opinion, R. 110) or to the historical background of Federal jurisdiction without regard to the limitations placed thereon by *Erie R. Co.* v. *Tompkins* in diversity cases (as in *Atlas Insurance Co.* v. *Southern, Inc.* 306 U. S. 563, 568, quoted in footnote 32 of the majority opinion, R. 105).

In *Russell* v. *Todd* 309 U. S. 280, this Court said at p. 289:

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and *in the absence of any state statute barring the equitable remedy in like cases*, the federal court is remitted to and applies the doctrine of laches as controlling [citations]." (Italics ours.)

At p. 290:

> "The present suit being, as we have seen and as the court below held, exclusively of equitable cognizance, in that it is not predicated upon any legal

cause of action, the statute is not one which a federal court of equity will adopt and apply as a substitute for or a supplement to its own doctrine of laches, *unless it is applied to like causes of action in the state courts.*" (Italics ours.)

At p. 293:

"We take it that in the absence of a controlling act of Congress *federal courts of equity*, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act *adopt and apply local statutes of limitations* which are applied to like causes of action by the state courts. Cf. Mason v. United States, 260 U. S. 545; Jackson County v. United States, 308 U. S. 343. In thus giving effect to state statutes of limitations as a substitute or supplement for the equitable doctrine of laches, it must appear with reasonable certainty that there is a state statute applicable to like causes of action." (Italics ours.)

The Fifth Circuit Court of Appeals in *Roos* v. *Texas Co.* 126 F. (2d) 767, 768, has understood this decision to mean exactly what it says; namely, that applicable State statutes of limitation must be applied in Federal suits in equity exactly as at law, if so applied by the law of the State. The Second Circuit Court of Appeals has erroneously reached a different conclusion. In its memorandum addressed to counsel after receipt of the petition for rehearing, the Court expressed its belief as follows (R. 61):

"In the light of the statement in *Russell* v. *Todd*, 309 U. S. 280, 287, ('The Rules of Decision Act does not apply to suits in equity'), this court thinks that, as to state statutes of limitations in suits in equity, the doctrine remains what it was before *Erie* v. *Tompkins*, 304 U. S. 64."

Consideration of *Mason* v. *United States* 260 U. S. 545, 558 (cited in *Russell* v. *Todd*, quoted above) made it plain that the Rules of Decision Act was not decisive because merely declaratory of the rule antecedently existing. Moreover, the opinion of the Second Circuit Court of Appeals in *Shultz* v. *Manufacturers & Traders Trust Co.*, 128 F. (2d) 889, 896, shows that the Court below understood *Russell* v. *Todd* to mean that an explicit applicable State statute must govern even a suit of exclusively equitable cognizance in the State courts. This Court denied certiorari, 317 U. S. 674.

Although concurring in the opinion of the Second Circuit Court of Appeals in the *Shultz* case, the author of the opinion below in the instant case (Frank J.) has sought to escape the plain meaning of *Russell* v. *Todd* and take the statute of limitations of the forum outside the rule of *Erie R. Co.* v. *Tompkins* by an accumulation of dicta from opinions of the Court prior to the overturn in *Erie R. Co.* v. *Tompkins* and by the elevation of footnotes above the body of the decision in *Russell* v. *Todd*. Thus the majority below suggests that the language of this Court which we have quoted from *Russell* v. *Todd* at pp. 20-1 above is somehow qualified by the citation of pre-1938 cases in footnote 1 at p. 288 of 309 U. S. (R. 108), although it would seem clear that the intention of the footnote was merely to provide historical background for the decision of the Court announced in the text.

Such a use by the majority below of recent precedents of this Court appears to us to justify notice here. Attention might also be called to the mode of reasoning adopted by the majority (R. 108) whereby opinions written for this Court by such justices as Brandeis J. and Holmes J. (both known to have been opposed to the theory of *Swift*

v. *Tyson*) are retroactively interpreted to have been, notwithstanding their being dated before 1938, entirely consistent with *Erie R. Co.* v. *Tompkins* because Brandeis J. in 1938 persuaded the majority to overrule *Swift* v. *Tyson*. Thus we find that, because Brandeis J. in *Benedict* v. *New York* 250 U. S. 321 (1919) cited with approval *Kirby* v. *Lake Shore, etc., R. Co.* 120 U. S. 130 (1887), and because Brandeis J. nineteen years later wrote the majority opinion in *Erie R. Co.* v. *Tompkins*, therefore *Erie R. Co.* v. *Tompkins* is held to mean that the New York statute of limitations need not be obeyed by a Federal court in equity (R. 109); or to put it in the language of the majority below:

> "We find it impossible to believe that, speaking for the Court, he [Brandeis, J.] intended to overrule *Kirby* and *Pusey & Jones* in *Erie* v. *Tompkins* which nowhere mentions those cases or the doctrine which they embody."

We desire an opportunity to argue in this Court that *Erie R. Co.* v. *Tompkins*, even if it does not mention the cases cited, does overrule or distinguish the doctrine which they embody. The proposition seems to us perfectly plain, and is made evident by comparing the theory of Harlan J. in the *Kirby* case 120 U. S. at 138, that the equity jurisdiction of the Federal courts should be exercised "according to rules and principles applicable alike in every State" with the conclusion in *Erie R. Co.* v. *Tompkins* 304 U. S. at 79 (following Holmes J. in *Kuhn* v. *Fairmont Coal Co.* 215 U. S. 349, 372) that there is no Federal common law.

The majority below seek to rest their conclusion upon a theory which we believe particularly to deserve the immediate attention of this Court, viz. that there is a field of

"equitable 'remedial rights'" (R. 108) as to which, though substantive in character, Federal courts have independence even in diversity cases notwithstanding *Erie R. Co.* v. *Tompkins*, *Ruhlin* v. *New York Life Insurance Co.* and *Russell* v. *Todd*. The restriction imposed on this brief by Rule 38 of this Court prevents any real discussion of this theory here. We can here merely indicate that the authorities employed below to remove the local statute of limitations from the rule of *Erie R. Co.* v. *Tompkins* really turn upon an ambiguous use of the word "jurisdiction". When in *Robinson* v. *Campbell* 3 Wheat. 212 and in *Boyle* v. *Zacharie* 6 Pet. 648 and in *Payne* v. *Hook* 7 Wall. 425 the court urged the independence of Federal "remedial rights" as a reason for rejecting a State court practice or for following a practice not recognized in the State court, and when in like cases (R. 104, footnote) similar results were reached, it seems to us plain that the court had in view *practice* in equity and not substantive law. It is furthermore obvious that the language in these and similar decisions ante-dating 1938 could not have been used with reference to the principle announced in *Erie R. Co.* v. *Tompkins* and must be deemed overruled in so far as inconsistent with it.

The essential distinction which must be made in order to understand the pre-1938 precedents in the light of *Erie R. Co.* v. *Tompkins* is the distinction which the majority below has not made, i.e. that between the historic equity jurisdiction (or field of authority) and the rules or principles by which that jurisdiction shall be exercised. This distinction is plainly pointed out by this Court in *Mason* v. *United States* 260 U. S. 545, 557:

> "But while the power of the courts of the United States to entertain suits in equity and to decide them

cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation."

The New York statute of limitations leaves unabridged the power of the courts of the United States to entertain suits in equity and to decide them. It merely determines the point at which defendant is entitled to be protected by the lapse of time. This defense constitutes a substantial right based upon sound public policy, as pointed out by this Court in *Guaranty Trust Company* v. *United States*, 304 U. S. 126, 136. While procedural in form, such a defense has a substantive content as fully as the local law concerning the burden of proof (*Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208) or the local law concerning the parol evidence rule (*American Seating Co.* v. *Zell*, decided in this Court May 9 1944, No. 613, reversing 138 F. [2d] 641).

The fact that the statute of limitations was procedural in its original concept may have led the majority below to believe that strict application of local limitations would impair the independence of the Federal courts in respect of "remedial rights". Yet it is to be noted that the New York statute in no way alters the *manner of enforcement* of such rights as the plaintiff York may have against the petitioner according to the most ancient Federal equity jurisprudence; it merely fixes the time beyond which those rights may no longer be enforced in the Federal or in the State courts.

Argument by the majority below (R. 108-9) from such cases as *Henrietta Mills* v. *Rutherford County* 281 U. S. 121 and *Pusey & Jones Co.* v. *Hanssen* 261 U. S. 491, both decided before 1938, illustrates the inappositeness of the "remedial rights" doctrine to the question here of the

enforcement in a Federal equity court in a diversity case of the applicable statute of limitations of the forum. The authorities cited relate merely to *practice* in the Federal courts, holding in the former case that a State statute granting a right to proceed in equity not conferred by the Federal statutes could not enlarge the right to proceed in a Federal equity court and holding in the latter case that a State statute permitting appointment of a receiver upon application of a simple contract creditor did not enlarge the right to proceed in a Federal equity court.

But the statute of limitations, establishing a defense and not purporting to confer a new remedial right, in no way enlarges the Federal practice in equity as established by the Constitution and statutes of the United States.

Even in exclusively equitable actions New York law rejects any reference to so-called "equitable principles" for the purpose of extending the statutory term of limitations. *Schmidt* v. *Merchants Dispatch Co.* 270 N. Y. 287; *Matter of City of New York* 239 N. Y. 220, 225; *Erickson* v. *Macy* 236 N. Y. 412, 415; *Gilmore* v. *Ham* 142 N. Y. 1; *Engel* v. *Fischer* 102 N. Y. 400; *Streeter* v. *Graham & Norton Co.* 263 N. Y. 39. Under the statutory scheme of limitations which has been in force in New York for almost 100 years, laches (whose principles the majority below has invoked, R. 114, as a reason for ignoring the New York statute) is no longer recognized as a defense in New York (with the unimportant exception of applications addressed to the discretion of the Court). *Pallitz* v. *Wabash R. Co.* 207 N. Y. 113, 130. In New York the defense of laches is available only to shorten (not to extend) the term limited by the statute of limitations in cases where the favor or discretion of the court is sought. *Groesbeck* v. *Morgan* 206 N. Y. 385, 389.

Yet laches is well understood to be a matter of substantive law affecting the right, not merely the remedy. *Menendez v. Holt* 128 U. S. 514, 523; *O'Brien* v. *Wheelock* 184 U. S. 450, 493. Hence the action of the majority herein in applying a doctrine of substantive law to rebut or repel the ordinary application of limitations pursuant to the statutes of the forum is a violation of the rule laid down in the *Erie* and *Ruhlin* cases and in many similar decisions of this Court.

C. Independently of the foregoing argument this action was barred in 1937 under the concurrent jurisdiction rule

As is pointed out in *Russell* v. *Todd* 309 U. S. at 289, when the jurisdiction of a Federal court in equity is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations. The opinion of this Court cites numerous authorities in the Federal courts for this principle. The principle has long been recognized in the law of New York, as stated in *Keys* v. *Leopold* 241 N. Y. 189 at 193:

> "When a legal and an equitable remedy exists as to the same subject matter, the latter is under the control of the same statutory bar as the former. (*Rundle* v. *Allison*, 34 N. Y. 180.)"

The claim of the plaintiff York being essentially for money damages (whether for loss occasioned to the noteholders or for benefits claimed to have been received by petitioner, R. 12), it would seem clear that the jurisdiction of equity herein is concurrent only. The majority below seem to have taken three positions on this question. *First*

they said that whether the jurisdiction in equity is concurrent or exclusive must be determined by Federal decisions as to the Federal equity jurisdiction as it stood in 1787 or 1789 (R. 111). This argument we believe to rest on the misunderstanding as to the significance of the "historic equity jurisdiction" of the Federal courts, and on the failure to observe the distinction between the practice and the content of that jurisdiction, to which we have above referred. *Wilson* v. *Koontz* 7 Cranch 202 and the other authorities on concurrent jurisdiction cited in this Court's opinion in *Russell* v. *Todd* 309 U. S. at 289, seem to us to show clearly that a case like the instant case is one of concurrent jurisdiction under the Federal precedents. *Second*, the majority below said that it is of no moment whether the equity jurisdiction here is or is not exclusively equitable because *Kirby* v. *Lake Shore R. Co.* 120 U. S. 130 was a case of concurrent jurisdiction but still the Court disregarded the New York statute of limitations on the ground of defendant's alleged fraud (R. 112). We think the majority below errs in characterizing that case as one of concurrent jurisdiction since the Court there (p. 134) held that the equity jurisdiction arose because of the complicated nature of the accounts between the parties rendering a trial by jury "difficult, if not impossible." We have already called attention (p. 23 above) to the ratio decidendi of the *Kirby* case which renders it inconsistent with *Erie R. Co.* v. *Tompkins*. *Third*, the majority below said that in all the cases cited in *Russell* v. *Todd* in which the Court applied the local limitations statute in a situation of concurrent jurisdiction, either there was no showing of any inequitable conduct by defendant or there was a showing that plaintiff slept on his rights (R. 113); but this method of distinction is to ignore

the ground on which in those cases this Court expressly placed its decision, and illustrates the necessity of a review here in order to clear the confusion which has arisen on the subject.

The dissenting opinion of Judge Augustus N. Hand (R. 121-2) forcefully illustrates the disadvantages bound to follow, from the aspect of public policy, the majority's rejection of the statute of limitations of the forum and its anachronistic injection of "equitable" considerations as a means of avoiding that statute.

POINT II

The majority opinion below violates the rule of the *Erie* and *Ruhlin* cases in refusing to apply the substantive law of New York.

Apart from the question of limitations which occupies 13 pages (R. 102-15), the 51 pages of the majority opinion below are devoted principally to a discussion of the evidence in the record on summary judgment and of the various inferences which might be drawn from such evidence, none of which is relevant to this application for certiorari. On three points, however, the majority have clearly departed from the substantive law of New York.

A. As to the Existence of a Trust

Under the law of New York a *res* is one of the four essentials of a valid trust. *Brown* v. *Spohr* 180 N. Y. 201, 209; *Miller* v. *Guaranty Trust Company* New York Law Journal June 9 1942 p. 2246, affirmed 265 A. D. 1040, leave to appeal denied 291 N. Y. 829. The Second Circuit Court of Appeals on the same facts previously so held in

Hackner v. *Morgan* 130 F. (2d) 300, 303 (Frank J. not concurring on this point), cert. denied 317 U. S. 691, with the following statement:

> "As we have said before, 'A trust involves a specific subject matter or res.' In re United Cigar Stores Co., 2 Cir., 70 F. 2d 313, 315. See Bradford v. Chase National Bank, D. C., 24 F. Supp. 28, affirmed Berger v. Chase Nat. Bank, 2 Cir., 105 F. 2d 1001, affirmed 309 U. S. 632, 60 S. Ct. 707, 84 L. Ed. 990. Here there is nothing upon which a trust can be founded."

The majority in the instant case have sought to innovate upon this established law by arguing that, since *res* means only "thing", it can be an intangible such as a chose in action and that the powers conferred upon petitioner by the indenture could be characterized as "powers in trust" (R. 83). To characterize the powers conferred upon petitioner by the indenture as powers in trust equivalent to a *res* is an obvious departure from the substantive law of the forum, since the elements of the concept are clearly stated in *Brown* v. *Spohr* so as to exclude a power or chose in action. According to the Court of Appeals in that case, the *res* necessary to the existence of a trust must be (180 NY at 209)

> "'. . . a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee. . . .'"

The segregated assets and assigned securities described and provided for in the Van Sweringen Corporation indenture were in no way transferred to petitioner as trustee or otherwise. Finally, the New York courts have in *Miller* v.

Guaranty Trust Company expressly held that powers conferred by security-holders upon a syndicate of agents who could exercise such powers in a fiduciary capacity only, are insufficient to constitute an express trust under the law of New York. Mr. Justice Shientag said at Special Term in that case:

> "No express trust was established under the terms of the agreements entered into by the various parties. The defendants are not express trustees of a subsisting trust. There is an absence of all of the essential elements to be found in a trust of personal property (Brown v. Spohr, 180 N. Y., 201; Gilmore v. Ham, 142 N. Y., 1). The rights arising out of the agreements were contractual in nature."

B. As to the Exculpatory Clause

The indenture herein expressly provided that petitioner as trustee should not be liable for anything except its own "wilful misconduct" (Hackner record, p. 98). The proof on summary judgment showed, in the form of three affidavits of persons who participated in the transaction—such affidavits covering 35 pages (pp. 15-49) of the Hackner record and standing without contradiction—that the petitioner in approving the exchange offer acted with care, under legal advice, and with eminently proper and even laudable motives for the purpose of saving the position of the noteholders. The dissenting judge in his analysis of the evidence (R. 119-21) came to the same conclusion. This had been the conclusion of the District Court and the majority of the Court of Appeals in the *Hackner* case 43 F. Supp. 637, 130 F. (2d) 300. In reaching a different result, the majority in the instant case pointed to the fact that the petitioner had a dual position and a potential ad-

verse interest (R. 84-9), and remanded the case for trial so that evidence might be taken as to the disclosure made to non-accepting noteholders like York's assignor.

In coming to this result, the majority rejected the defense based on the exculpatory clause in the indenture (R. 98-101), notwithstanding the fact that in comparable circumstances a similar exculpatory clause was enforced and the trustee held not liable in *Hazzard* v. *Chase National Bank*, 159 Misc. 57, 257 A. D. 950, 282 N. Y. 652. In the *Hazzard* case, Rosenman J. (159 Misc. at 80-1, 83-4) clearly stated the law of New York to require the enforcement of an exculpatory clause in the absence of actual bad faith, notwithstanding the trustee's occupying inconsistent positions. The facts of the *Hazzard* case even as summarized in the opinion below (R. 99-100) were stronger against the trustee than the facts of the instant case.

Yet the majority refused to give effect to the substantive law of New York as illustrated in the *Hazzard* case on the remarkable ground that it lacks "precedential force here" (R. 100) because *after a trial* the facts *might* indicate bad faith on petitioner's part. This remarkable result can logically be explained on only one of two grounds, either of which would seem to justify attention at the hands of this Court. One ground might be that the Second Circuit Court of Appeals will not, in applying the doctrine of *Erie R. Co.* v. *Tompkins*, regard any case establishing the law of New York as having "precedential force" if any fact in that case is different from any fact in the case at bar. We do not assume this was the meaning of the language used here. The second ground might be that the evidence in the present record on petitioner's motion for summary judgment under Rule 56 is not sufficient to exonerate petitioner

of bad faith because further evidence might be found on a trial, and therefore the Court of Appeals will not be bound by the record made on summary judgment under Rule 56 in the same way as it would be bound by the record made upon a full trial. Since respondent stipulated the truth of the facts set forth in the affidavits on summary judgment and based her own cross-motion on them, any such treatment of this record can only result in an impairment of the efficacy of the procedure for summary judgment as established by the Federal Rules of Civil Procedure which this Court promulgated.

C. As to Plaintiff's Status as Assignee

The record is clear that plaintiff did not hold her $6,000 of notes at the time of the exchange offer complained of but acquired them on April 19 1934 as a gift (R. 16). The substantive law of the forum is that such an assignee of obligations cannot bring suit in respect of transactions occurring before he acquired title; the cases are cited by the majority below with the statement that they "seem so to hold" (R. 101-2). But the majority avoid applying the New York law on the subject, with the statement that New York still permits a cause of action to be specifically assigned and that the present record does not show whether or not there was an assignment either "express or implied in fact" (R. 102).

This holding is contrary to the law of New York with respect to the burden of proof on the subject as set forth in the latest case cited by the majority, *Smith* v. *Continental Bank & Trust Company* 292 N. Y. 275, 279. There the Court of Appeals held that a bondholder asserting a cause

of action for damages against a trustee need not allege in his complaint that he was owner of the bonds at the time of commencement of the action, since even if he had assigned the bonds, he would retain the cause of action. The question arose on a motion directed to the sufficiency of the complaint. As to the suggestion that plaintiff might nevertheless have executed a specific assignment of the cause of action, the Court of Appeals held that the burden lay on the party who so asserted (p. 279):

> "It may be that the plaintiff's cause of action was transferred to the receiver of S. W. Straus & Co., Inc., pursuant to the order of the Supreme Court. That order is not before us nor are its terms alleged in the complaint. We assume, therefore, that nothing more than the bonds was transferred. An assignment would be necessary to transfer the right of action."

This Court in 307 U. S. 617 granted certiorari for refusal of the Fifth Circuit Court of Appeals to follow the law of Texas with respect to the burden of proof as to cloud on title, and upon review held that the Court of Appeals had erroneously failed to follow the substantive law of Texas: *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208. The same situation exists in this case. The procedure of the majority below also departs from proper practice under Rule 56, as illustrated by the opinion of the same Court in *Engl v. Aetna Life Insurance Co.* 139 F. (2d) 469:

POINT III

The fact that final judgment has not been entered is an additional reason for granting certiorari in view of the importance of the questions involved.

While the decision below is not final but only remands the case for trial, this is an additional reason for granting of certiorari at the present stage because of the importance of the questions above discussed and the misconceptions concerning them which, it is respectfully submitted, the Second Circuit Court of Appeals has adopted. The power of this Court to grant certiorari before final judgment is undoubted. Judicial Code, § 240 (a), as amended by the Act of February 13 1925 (43 Stat. 938, 28 U. S. C. § 347 (a)). *Gay v. Ruff* 292 U. S. 25, 28-31; *United States v. Gulf Refining Co.* 268 U. S. 542, 544-545; *Forsyth v. Hammond* 166 U. S. 506, 511-515; *American Construction Co. v. Jacksonville Railway* 148 U. S. 372, 384-385. In *Guaranty Trust Company v. United States*, 302 U. S. 681, this Court granted certiorari with respect to the decision of the Second Circuit Court of Appeals reversing a judgment obtained by defendant upon motion before answer on the ground of the statute of limitations only and directing a trial. On the subsequent review here the decision below was reversed, 304 U. S. 126.

If following a denial of certiorari at this time, the case is tried and petitioner prevails with respect to one or more of the various issues of good faith, disclosure or laches indicated by the Circuit Court of Appeals, the decision here sought to be reviewed will continue to be a source of embarrassment and confusion in the correct solution of the important questions involved.

CONCLUSION

This case involves matters of novel impression and of importance in the future application of the rule laid down by this Court in *Erie R. Co.* v. *Tompkins* and in the proper correlation of Federal and State law, which matters should be forthwith reviewed in this Court by writ of certiorari in order to avoid continuing confusion and litigation in the many cases of similar character which are constantly arising in the financial and mercantile center represented by the Second Circuit.

Respectfully submitted,

JOHN W. DAVIS
RALPH M. CARSON
Counsel for Petitioner

New York, N. Y., July 12 1944.